No. 14874

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA, LAUGHLIN E. WATERS, United States Attorney, and IRWIN R. WEISS,

Appellees.

OPENING BRIEF OF APPELLANT.

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Statement of Basis of Jurisdiction.

This is an appeal from a judgment by the District Court of the United States for the Southern District of California, Central Division. The judgment denies (without hearing of oral evidence) appellant's request for the return of personal property alleged to have been obtained from him by a Special Agent of the Bureau of Internal Revenue in violation of the Fourth and Fifth Amendments to the United States Constitution; temporary restraining order; and injunction-suppression of evidence [R. 3], and to enjoin its presentation to the Grand Jury.

A Motion for New Trial was filed within the time prescribed by law [R. 60], which Motion was denied on the 7th day of June, 1955 [R. 67].

Notice of Appeal by appellant was duly filed within the time prescribed by law [R. 67].

Jurisdiction.

The District Court had jurisdiction under Title 28, U. S. C., Section 1331(3), and this Court has jurisdiction under Title 28, U. S. C., Section 1291.

Opinion Below.

The District Court's opinion [R. 50] has not been officially reported in the Federal Supplement.

Statement of the Case.

This case arises out of an alleged unlawful search and seizure of the personal books and records belonging to the appellant by a Special Agent of the Bureau of Internal Revenue, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America.

The proceedings below were brought, prior to indictment, by the filing, on January 4, 1955, of a complaint in a civil proceeding, for a temporary restraining order and perpetual injunction enjoining the United States, and all persons in active participation with it, from presenting any and all of the evidence illegally obtained from appellant, and all information obtained therefrom to the United States Grand Jury, and suppressing all evidence obtained as a result of the illegal means used to obtain the books and records of the appellant, and ordering the return of all transcripts and copies of records, books, invoices, checks, and other physical records and objects to appellant or such other persons as may be lawfully entitled thereto [R. 3].

As a part of the proceedings below, the appellant filed a Motion for Preliminary and Temporary Injunction [R. 9], and an Order to Show Cause for Temporary Re-

straining Order [R. 13], which were based upon the complaint on file [R. 3] and the affidavits of the appellant [R. 10] and one Ward A. Faoro [R. 36].

So far as the Motion for Temporary Restraining Order sought to enjoin the presentation of evidence to the Grand Jury is concerned, it is now moot, for the threatened indictment was returned on August 31, 1955 [R. 75].

Briefly, the appellant alleged that he had been induced to turn over his books and records through fraud and deceit practiced upon him by Special Agent Irwin R. Weiss of the Bureau of Internal Revenue, who represented that he wanted to re-check appellant's books and records for the years 1947 and 1948. Appellant also alleged that his bookkeeper, one Dorothy Varble, was an informer and conspired with Special Agent Weiss to obtain appellant's permission to inspect his business books and records for this limited purpose; and then, contrary to this restricted permission, Dorothy Varble gave access to all of the books and records to Special Agent Weiss.

Appellant further alleged that Special Agent Weiss suppressed the fact that the purpose of his investigation was to obtain evidence for contemplated criminal proceedings; and at no time did he advise the appellant of his Constitutional rights, nor that the appellant could refuse to turn over his business books and records for examination.

The government offered, in opposition to appellant's Motion for Temporary Injunction, affidavits of Special Agent Weiss [R. 14] and Dorothy Varble [R. 22], which did not specifically deny the appellant's allegations but which were particularly phrased in such a manner as to leave many matters to conjecture and implication.

The appellant filed an affidavit [R. 29] categorically denying each material fact alleged by Special Agent Weiss and Dorothy Varble.

The complaint and the Motion for Temporary Injunction and Suppression of Evidence, together with the affidavits, constitute the only pleadings in the case. The government filed no answer to the complaint. The case, as made, was entirely by affidavit, and no oral evidence was received by the court.

The requested relief was denied by the court in an order made on March 28, 1955 [R. 50], and pursuant thereto, Findings of Fact and Conclusions of Law and Judgment were signed by the court on April 18, 1955 [R. 54].

Specifications of Error.

Essentially, this appeal challenges the failure of the court below to grant appellant a hearing on oral evidence to resolve the conflicts of facts raised by the pleadings and the affidavits, and holding that the civil action for the return of personal property was a criminal proceeding under Rule 41(e) of the Federal Rules of Criminal Procedure and that appellant had intelligently and understandingly waived his rights under the Fourth and Fifth Amendments. The specifications of error in the court's findings are as follows:

(1) Holding that appellant's civil action was a motion for return of property and to suppress evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, instead of following Rule 56 of the Federal Rules of Civil Procedure;

(2) Holding that the action arises out of the District Court's power to discipline an officer of the court and is

equitable in nature, and that pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, the motion should be heard and tried upon the facts by the court, without a jury;

(3) Finding that appellant gave Special Agent Weiss permission to examine his books and records and imposed no limitation on his consent;

(4) Holding that the failure of Special Agent Weiss to advise appellant of his rights under the United States Constitution, Amendment V, not to be a witness against himself, does not render appellant's consent to examine his books involuntary;

(5) Holding that the failure of Special Agent Weiss to advise appellant that a criminal investigation was pending was not a strategem amounting to unlawful search and seizure within the meaning of the United States Constitution, Amendment IV;

(6) Holding that appellant, as a reasonable man, is held to understand that when he gave his permission to inspect his books and records to an investigator charged with enforcing the law, and placed no limitations on such permission, he permits the inspection for all purposes relevant to the inquiry, including evidence of wilful tax evasion;

(7) Holding that appellant's right to be free from unlawful search and seizure under the United States Constitution, Amendment V, was not violated;

(8) Holding that appellant was not involuntarily compelled to be a witness against himself;

(9) Holding that appellant's consent to examine his books and records was voluntarily and understandingly

made, was not revoked, and continued to be voluntary during the period of investigation of his books and records by Special Agent Weiss;

(10) Finding that appellant's civil action for the return of personal property was a motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure;

(11) Hearing the matter upon affidavits, depriving appellant of the trial of a civil action upon oral evidence and its merits.

(12) Denying appellant's motion for a temporary injunction restraining the appellees from doing any of the acts mentioned in Paragraph 1 of appellant's prayer for relief in his complaint;

(13) Refusing to order the return of all transcripts of books, papers, documents, records, and information obtained therefrom by Special Agent Irwin R. Weiss and belonging to appellant;

(14) Refusing to order the suppression of all of the property mentioned in Paragraph (13) herein as evidence.

Summary of Argument.

The civil proceedings seeking the return of personal property were in the nature of a claim and delivery action and were properly brought before any criminal indictment, since appellant alleged a threatened deprivation of rights guaranteed to him by the Constitution.

The provisions of the Fifth Amendment are to be liberally construed in favor of the appellant.

The appellant contends that he did not knowingly and understandingly waive his immunity privilege under the Fourth and Fifth Amendments, but that his consent was

obtained by trickery, fraud, and deceit practiced upon him by Special Agent Weiss of the Bureau of Internal Revenue.

This trickery, fraud, and deceit consisted of the suppression, by Special Agent Weiss, of material facts from the appellant; and had these facts made known to him, appellant would not have permitted any examination of his personal books by an agent of the Bureau of Internal Revenue.

Among the material facts constituting fraud and deceit were the following:

That Special Agent Weiss had been informed by Dorothy Varble, appellant's bookkeeper, that appellant was suspected of tax evasion, which information Special Agent Weiss withheld from appellant.

That Dorothy Varble furnished certain information to the Bureau of Internal Revenue for the purpose of obtaining an informer's fee; and in furtherance of that end, contrary to appellant's specific instructions to give Special Agent Weiss his books for 1947 and 1948 only, for the purpose of re-checking them, she, without any limitation, gave Special Agent Weiss all appellant's books and records.

That appellant contends he was deluded into giving his consent to the examination of his books for the years of 1947 and 1948 by the representations that Special Agent Weiss desired to re-check them. Appellant was not aware of any irregularities, because these same books had been checked for these particular years by Revenue Agent Calkins, who made some minor technical civil adjustments which had been concluded without any indication even of civil fraud.

That Special Agent Weiss did not initially identify himself to the appellant as a Special Agent, nor did he explain to him that his principal duty is to obtain evidence for criminal proceedings.

That Special Agent Weiss did not disclose the nature of the assignment he had received from his superior.

That the suppression of the enumerated material facts was equivalent to fraud and deceit, and appellant did not legally consent to an examination of his books and records, because the consent was not understandingly and intelligently given, and the government failed to sustain the burden of showing that there was true consent.

Appellant contends that Special Agent Weiss could not have obtained a subpoena under Section 3602 of the Internal Revenue Code of 1939 if his investigation were merely exploratory.

The property of the appellant having been seized in violation of the Fourth and Fifth Amendments, it should have been returned; and it should also have been suppressed as evidence.

The appellant alleged facts sufficient to entitle him to a hearing on the merits after the issue was joined.

Appellant contends that he was deprived of an important right by the court's denying him a hearing and deciding the civil matter under the Federal Rules of Criminal Procedure, instead of the Federal Rules of Civil Procedure.

The most important issue of waiver of Constitutional rights should not be resolved by affidavit.

POINT I.

Appellant's Petition Alleged a Violation of His Rights Under the Fifth Amendment and Could Properly Be Brought Before the Indictment.

The Federal District Court may entertain and grant relief on a petition filed prior to indictment seeking a return of all papers, documents, or objects unconstitutionally seized and the suppression of the same as evidence.

Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574;

Go-Bart Co. v. U. S., 282 U. S. 344, 355, 51 S. Ct. 153;

Weldon v. U. S. (9th Cir.), 196 F. 2d 874, 875, cert. den. 51 S. Ct. 153;

In re Fried (2nd Cir.), 161 F. 2d 453, cert. den., 331 U. S. 858;

Freeman v. U. S. (9th Cir.), 160 F. 2d 69, 70 (1946);

Turner v. Camp (5th Cir.), 123 F. 2d 840 (1933);

In re No. 32 E. 67th St., 96 F. 2d 153;

Foley v. U. S. (5th Cir.), 64 F. 2d 1 (1933);

U. S. v. Poller (2nd Cir.), 43 F. 2d 911 (1930).

The rationale of the cases is that the petition for relief is addressed to the inherent power of the court to discipline an officer of the court.

In the case of *Go-Bart Co. v. U. S.,* 282 U. S. 344, 355, the court said:

> "The United States Attorney and the Special agent in charge, as officers authorized to conduct such prosecution, and having control and custody of the

papers for that purpose, are in respect of the acts relating to such prosecution, alike, subject to the proper exertion of the disciplinary powers of the court. And on the facts herein shown, it is plain that the District Court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioner."

See:

Cogen v. U. S., 287 U. S. 221, 225, 49 S. Ct. 118.

POINT II.

The Consent of the Appellant to the Examination of His Books and Records Was Obtained by Trickery, Fraud and Deceit in Violation of the Fourth and Fifth Amendments.

Realistically viewed, the crucial issue in this case is whether the appellant has been deprived of his Constitutional rights.

Briefly, we contend that the court below erred in finding that appellant's Constitutional rights were not violated by the procedure and tactics employed by Special Agent Irwin R. Weiss.

The unreasonable search and seizure, in violation of the Fourth Amendment, compels the victim to produce evidence; and if the evidence is self-incriminating, the use of this evidence violates the victim's rights under the Fifth Amendment.

It thus appears that the protection against self-incrimination afforded the individual under each of these Amendments is a protection against compulsion exerted against him which forces the disclosure of self-incriminating evidence.

See:

Davis v. U. S., 328 U. S. 580, 582, 587, 66 S. Ct. 1256.

The general rules to be applied in the interpretation of situations under the Fifth Amendment are stated in the case of *Hoffman v. U. S.,* 341 U. S. 479, 71 S. Ct. 814, where the court said, commencing at page 485:

> "The Fifth Amendment declares in part that 'No person . . . shall be compelled in any criminal case to be a witness against himself.'
>
> " 'This guarantee against testimonial compulsion, like other provisions of the Bill of Rights,' was added to the original Constitution in the conviction that too high a price may be paid, even for the unhampered enforcement of criminal law, and that, in its attainment, other social objects of a free society should not be sacrificed," (citing *Feldman v. U. S.,* 322 U. S. 487, 489, 64 S. Ct. 1082). *"This provision in the Amendment must be accorded liberal construction in favor of the right it was intended to secure."* (Emphasis supplied.) "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," (citing *Blau v. U. S.,* 340 U. S. 150 [1950]).

See also:

Quinn v. U. S., 349 U. S. 155, 74 S. Ct. 861;

Emspak v. U. S., 349 U. S. 190, 74 S. Ct. 23;

Smith v. U. S., 337 U. S. 137, 150, 69 S. Ct. 1000.

The Supreme Court, in *McDonald v. U. S.,* 335 U. S. 451, at 453, 69 S. Ct. 191, in speaking of the Fourth Amendment, said:

> "This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization, and with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate, on probable cause, supported by oath or affirmation. And the law provides, as a sanction against the flouting of this Constitutional safeguard, the suppression of evidence secured as a result of the violation when it is tendered in a federal court."

It has always been the rule that agents of the United States Government should be held to act in the highest good faith. If they obtain a waiver of a person's Constitutional rights by withholding from him and suppressing the fact that they are seeking evidence for a criminal prosecution, or misleading him on any material fact, they are not acting in good faith, and should not be able to benefit by a wrong which they have purposely and intentionally perpetrated.

The standards of conduct of Federal agents are enunciated in the very recent case of *Rae v. U. S.,* decided January 16, 1956, 76 S. Ct. 292, at page 294, where the court said:

> "The obligation of a Federal agent is to obey the rules. They are drawn for innocent and guilty alike. They prescribe standards of law for law enforcement. They are designed to protect the privacy of a citizen unless the strict standards of search and seizure are satisfied. That policy is defeated if a

Federal agent can flaunt them and use the fruits of his unlawful act in either Federal or state proceedings."

The law is well settled that evidence obtained by coercion, fraud, threats, or stealth is not submitted voluntarily and is equivalent to compelling the individual to be a witness against himself, and is not admissible against an accused. Self-incrimination is the same whether raised under the Fourth or the Fifth Amendment.

The authorities on this proposition are many. Only the following are cited:

United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93;

McDonald v. U. S., 335 U. S. 451, 69 S. Ct. 191;

Johnson v. U. S., 333 U. S. 10, 68 S. Ct. 367;

Go-Bart Co. v. U. S., 282 U. S. 344, 51 S. Ct. 153;

United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420;

Agnello v. U. S., 269 U. S. 20, 33-34, 46 S. Ct. 4;

Amos v. U. S., 255 U. S. 313, 41 S. Ct. 360;

Gouled v. U. S., 255 U. S. 298, 306, 311, 41 S. Ct. 261;

Weeks v. U. S., 232 U. S. 383, 34 S. Ct. 341.

Consent to waive immunity must be entirely voluntary and not induced by misrepresentation, fraud, trickery, promise, or threats.

See:

Gouled v. U. S., 255 U. S. 298, at 305-306, 41 S. Ct. 261;

Go-Bart Co. v. U. S., 282 U. S. 344, 51 S. Ct. 153.

The government contended in its affidavits that the appellant consented to the examination. In order for the consent to constitute a waiver of Constitutional rights, it must appear that the consent was freely and intelligently given, and the government has the burden of showing that there was true consent. See:

United States v. Rekis (D. C., Mass.), 119 Fed. Supp. 687.

Appellant contends that the government has failed to meet this burden. Had the appellant been informed of the nature of the examination, he would have had sufficient warning to avail himself of his privilege against self-incrimination. He should have been entitled to know that a criminal investigation was being directed against him.

Analysis of the methods employed by Special Agent Weiss discloses a carefully staged plan of conduct which compelled and demanded that the Special Agent inform the appellant that his case was under criminal investigation. But nothing was said by Special Agent Weiss to appellant to apprise him of the true situation. Instead, the appellant was deluded into giving his consent by being misled into believing that the examination was merely a re-check of his 1947 and 1948 tax liabilities, which had been previously audited by Revenue Agent Forrest Calkins and which did not disclose any matters of civil or criminal fraud but only civil adjustments [R. 10]. Special Agent Weiss was very careful not even to mention whether it was a civil investigation.

Under such circumstances, it cannot be said that appellant voluntarily made available his papers for the purpose of establishing fraud for criminal prosecution.

Dorothy Varble admits (because she does not deny) that she was the informer and furnished to the Bureau of Internal Revenue the information that was instrumental in the institution of the investigation. Nor does Special Agent Weiss directly answer or reply to that specific charge.

Dorothy Varble does not specifically deny that appellant limited the inspection to re-checking his 1947 and 1948 records, nor does she refute appellant's contention that there was collusion between her and Special Agent Weiss when she turned over all of appellant's books and records without limitation. She attempts to justify her conduct by the preposterous and absurd statement that the appellant had told her, on numerous occasions, that all of his books and records should be made available for inspection to any authorized government official [R. 22].

It appears that she turned over, without any limitation, all of the binders and journals from 1944 through 1952 [R. 24] without Special Agent Weiss' asking specifically for them, although in Special Agent Weiss' conversation with Mr. Hoffritz over the telephone, he does not claim to have specified what years he wanted to examine [R. 15].

Special Agent Weiss did not specifically identify himself over the telephone [R. 15], and suppressed the fact that he was a Special Agent whose primary duty it is to obtain evidence for contemplated criminal proceedings. Unless the agent's identity is fully disclosed, the government is obtaining evidence by deceit.

Special Agent Weiss does not refute that having been assigned initially to conduct the investigation, instead of a Revenue Agent, put him on notice that it was a crim-

inal investigation, which information should have been conveyed to the appellant.

It is further significant that Special Agent Weiss did not explain the difference between a Special Agent and a Revenue Agent.

Prior to the reorganization of the Bureau of Internal Revenue in 1952, the Revenue Agent in charge was charged with the duty of auditing the returns which were received from the Office of the Collector of Internal Revenue, which were divided into the following classes:

(1) Those returns which were so complicated or so important that a field investigation was required without further consideration;

(2) Those returns which appeared to contain only minor irregularities which could be adjusted by correspondence with the taxpayer or by interviewing him at the office of the Internal Revenue Agent in Charge; and

(3) Those returns which did not appear to warrant investigation or contact with the taxpayer either by interview or correspondence.

The returns selected for field examination were then subjected to further study by the Office of the Internal Revenue Agent in Charge, and assigned by him for field examination. (See *Mertens Law of Federal Income Taxation,* Vol. 9, Sec. 49.23, p. 24; Sec. 49.27, p. 26.)

Under the Bureau of Internal Revenue's Reorganization Plan No. 1 of 1952, the functions of the Internal Revenue Agent and Special Agent were not changed.

The function of the Special Agent is described in *Treasury Department, Internal Revenue Circular 1—R. E. O. 1,* dated May 12, 1952, and is as follows:

> "The Intelligence Division embraces all Special Agents and will handle for the Director's office the type of work corresponding to that of a branch office of the present Intelligence Division under a Senior Special Agent. Thus, the separate identification of intelligence work, together with the rights to which Special Agents are entitled under the old organization, will be retained. In some Districts, there may not be an 'Intelligence Division' in every Director's office because the size of the area covered or the workload may not justify a separate division. In those cases where it is not justified, the Special Agents for that territory will be assigned to the 'Intelligence Division' at the District Commissioner's level. However, there will be no diminution in the intelligence activity, nor is there any intent to make any material shifts in the location of posts of duty.
>
> *"Intelligence Division.* Responsible for the investigation of tax fraud, enrollment, and other types of cases delegated to the Intelligence Division, and the preparation of prosecution and tax reports thereon; for operation of special racketeer tax drive and approval of all such cases for closing; and enforcement of the wagering tax law."

To the Special Agent was assigned the principal investigatory work where fraud in a return was suspected, and as in the past, where potential fraud cases were assigned to the Special Agent, whether *initially,* or whether called into an investigation being conducted by a Revenue Agent, who has gone far enough in his examination to

suspect fraud, and who feels the need of the expert hand of the Special Agent.

See:

Fraud Under Federal Tax Law, 2nd Ed., 1953, *Balter,* pp. 72-74, incl.

Under the Reorganization Plan No. 1, 1952, the audit division of the Director's Office continued to conduct the examination of the books and records the same as before the reorganization took place. (See: *Charts 1, 2 and 3 of the Reorganization Plan of the Bureau of Internal Revenue, 1954, Cumulative Pocket Supplement, Vol. 9, Mertens Law of Federal Income Taxation,* pp. 37-40, incl.)

The distinction between an Internal Revenue Agent and a Special Agent is best described by Joseph R. Baradell, former Special Agent in Charge, New York Intelligence Division, Bureau of Internal Revenue, in the 12th Annual Institute of Federal Taxation, New York University, November, 1953, at page 59, where he points out the difference in their duties as follows:

> "A Revenue Agent's duties are inspection of problems contained in the audit of the taxpayer's records, and determination of his correct tax liability.
>
> "The Special Agent's duties and responsibilities are primarily concerned with developing fraud features of the case, including a questioning of witnesses under oath, and procurement of documentary evidence for such use in court proceedings. He is also charged with the responsibility of recommendation for or against both criminal prosecution and *ad valorem* penalties for fraud or negligence."

The Honorable H. Brian Holland, Assistant Attorney General, in charge of Tax Division, Department of Justice,

in the sixth annual meeting of the Tax Institute, U. S. C. School of Law, at page 446, stated:

> "Investigations in cases of suspected tax evasions and other offenses under the Internal Revenue laws are made by Special Agents of the Intelligence Division of the Internal Revenue Service. If the Intelligence Division considers prosecution to be warranted, a recommendation to that effect is transmitted to the Regional Enforcement Counsel, and if he agrees, the case is forwarded to the Department of Justice, where it is assigned to the criminal section of the Tax Division."

See also:

Fraud Under Federal Tax Law, 2nd Ed., 1953, *Balter,* Sec. 27, p. 69.

The appellant's position is further supported by the recent case of *United States v. Wolrich,* 129 Fed. Supp. 528 (D. C., N. Y., 1955), in which it is pointed out:

> "Revenue Agent's Manual, in ¶675, prescribed the procedure to be followed where an Internal Revenue Agent discovers what he believes to be indications of fraud. If the Internal Revenue Agent in Charge concludes that the findings of the Internal Revenue Agent indicate probable fraud, he will then request the consideration of the Special Agent in Charge as to the necessity for a Joint Investigation. If the Special Agent in Charge decides to investigate, he 'will * * * promptly assign to the case a Special Agent.' From this it appears that a Joint Investigation is one that is initiated when probable fraud is indicated."

Special Agent Weiss gave no intimation or indication of any kind that appellant was suspected of criminal tax evasion; and further, Special Agent Weiss does not deny

that he well knew that if the taxpayer were aware that he was a criminal investigator, it would hinder the obtaining of the records.

He does not specifically refute the allegation of appellant that he knew that if he advised appellant that it was his purpose to obtain evidence for contemplated criminal proceedings, because he had information furnished by Dorothy Varble that there were irregularities in the appellant's books, and that the appellant was suspected, at least, of criminal tax evasion, the appellant would not have given his consent to an inspection of his individual books and records.

The submission of evidence by an individual under such circumstances is certainly not voluntary. It was neither with the knowledge of his rights nor with the knowledge that the government's purpose was to contend later that such submission, without notice of the purpose for which the evidence was being submitted, meant that the individual thereby waived his immunity privileges.

Under the Fifth Amendment, a person has the right to be dealt with honestly and fairly. This rule is enunciated in *Brock v. U. S.* (5th Cir.), 223 F. 2d 681, at 685, where the court said:

> "Before a man can be compelled to testify against himself, he must have *a fair chance to exercise* his right under the Fifth Amendment. *Where that fair chance is not afforded him,* evidence obtained in violation of his right is not only not admissible against him, but it is incapable of becoming the foundation for the violation of his rights under the Fourth Amendment. Freedom from unreasonable search would be a delusion indeed, if evidence obtained

through compulsory self-incrimination may be used as a basis for violating that right." (Emphasis added.)

If Special Agent Weiss' investigation was a general exploratory search, it could not have been undertaken with or without a warrant.

See:

United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430.

In the instant case, Special Agent Weiss had more than a suspicion. He had in his possession sufficient evidence to obtain a search warrant under Section 3602 of the Internal Revenue Code of 1939 (See App. [A]), to question the appellant about his income tax returns, where an opportunity would have been afforded to him to refuse to answer any question propounded to him.

Whenever possible, a subpoena or search warrant should be employed by government agents.

See:

Carroll v. U. S., 267 U. S. 132, 45 S. Ct. 280.

This was not done, because Special Agent Weiss well knew that he could not obtain a search warrant for the evidentiary material which he was seeking, and his deliberate misrepresentations to obtain evidence, which would not be otherwise available to him under a search warrant, should not be condoned.

The leading cases of *Gouled v. U. S.,* 255 U. S. 298, 310, 41 S. Ct. 261, and *United States v. Lefkowitz,* 285 U. S. 452, 465, 52 S. Ct. 420, also strongly support appellant's position.

The facts here compel the conclusion that the initial purpose of Special Agent Weiss was to secure evidence from the taxpayer's records for a contemplated criminal prosecution. The deliberate attempt to conceal the criminal aspect of an investigation raises a presumption of deceit, and suggests that the appellant would not have turned over the information if he had been aware of the government's purpose.

The law of fraud makes no distinction between false representations and implied misrepresentations, or a concealment.

See:

Charles Hughes & Co. v. Securities & Exchange Commission (2nd Cir.), 139 F. 2d 434, 437, cert. den., 321 U. S. 786.

Fraud is further defined in *Gibbons v. Brandt* (7th Cir.), 170 F. 2d 385, 391 (cert. den. 336 U. S. 921), where the court said:

> "Fraud also includes anything calculated to deceive, whether it be a single act or a combination of circumstances; whether suppression of truth or suggestion of what is false; whether it be by direct falsehood or by innuendo; by speech or by silence. It is sufficient that there were acts such as to mislead a reasonably cautious or prudent man in regard to the existence of a fact forming a basis of or contributing an inducement to some change of position by him."

There should not be any lesser degree of protection to an individual wherein a search warrant is required than where a government agent gains access to one's books and records by suppressing a material fact.

See:

United States v. Arrington (7th Cir.), 215 F. 2d 630, 633.

There certainly is no justification for an exhaustive search of appellant's records without giving him an opportunity to refuse to give evidence which is to be used against him.

The rights of an accused are to be zealously guarded; and if a taxpayer may waive his immunity only by an intelligent act . . . that is, the knowledge of all the material facts . . . why should incriminating evidence be obtained, with knowledge or suspicion of criminal fraud, without notice to the appellant that such evidence may be used against him in a criminal proceeding, when the written word of an appellant and his books and records will convict as readily as any signed confession?

The tenor of all the cases resolves itself into one single question, that being the good faith of the Federal officers in obtaining the evidence.

See:

Catalanotte v. U. S. (6th Cir.), 208 F. 2d 264.

The investigative procedure reflected here has raised the identical questions answered by the court in *United States v. Guerrina* (D. C., Pa.), 1953, 112 Fed. Supp. 126, 128; re-argument, 126 Fed. Supp. 609:

(1) Did the appellant legally consent to an examination of his books and records by the Special Agents?

(2) Was the unauthorized entrance by the agents into filing cabinets containing work orders, examination of the

patterns, and acquisition of private correspondence an unlawful search and seizure in violation of the Fourth Amendment to the Constitution?

In the first *Guerrina* opinion, the court determined that obtaining evidence under the guise of a civil investigation is tantamount to obtaining evidence under the guise of a business or social call, using as an analogy *Gouled v. U. S.*, 255 U. S. 298, holding tax records obtained by stealth inadmissible, and specifically held that under the circumstances, the government agents were required to inform the taxpayer that his case was under criminal investigation.

The facts in the instant case are comparable to those in the case of *United States v. Lipshitz* (D. C., N. Y.), 132 Fed. Supp. 519, in which the District Court ordered a hearing and suppressed certain evidence; and the court said at page 523:

> "I am satisfied that from June 30, 1948, the day Potts was assigned to the case, he, together with Obst, were jointly engaged in the preparation of a case for the criminal prosecution of the Defendant, and they did not inform him, nor did he know, that they were so engaged. Pott's assignment of Obst, a Revenue Agent, to obtain, without the Defendant's knowledge and consent, extensive information and extracts from the taxpayer's books and records far in excess of those required for the customary routine audit of a Revenue Agent, cannot be appreciably distinguished from the obtainment thereof by stealth or subterfuge."

See also:

In re Liebster (D. C., Pa.), 91 Fed. Supp. 814.

The consent which makes available an individual's records to official search and seizure cannot be deemed voluntary unless it be made clearly to appear that it was freely and intelligently given and not expressed impliedly or coerced.

See:

United States v. Minor (D. C., Okla.), 117 Fed. Supp. 697.

The courts have granted motions to suppress evidence where there has been the slightest deception, and have required the government to show that the consent is unequivocal and specific.

See:

Gouled v. U. S., 255 U. S. 298, 305, 41 S. Ct. 261;

Judd v. U. S. (C. A., D. C.), 190 F. 2d 644, 651;

Karwicki v. U. S. (4th Cir.), 55 F. 2d 225;

Kovach v. U. S. (6th Cir.), 53 F. 2d 639;

Cf. U. S. v. Shotwell Mfg. Co. (7th Cir.), 225 F. 2d 394.

Special Agent Weiss carefully avoided identifying himself as a Special Agent when he first talked to appellant over the telephone, and his permission was granted under color of his being a government man.

A waiver of Constitutional immunity from unreasonable searches cannot be inferred from the admitting of law enforcement officers in compliance with their request for an interview.

A very important rule involving an essential element of the doctrine of waiver is announced in the case of

Johnson v. U. S., 333 U. S. 10, where the Supreme Court held at page 13:

> "Entry to the defendant's living quarters, which was the beginning of the search, was demanded under the color of his office. It was granted in submission to authority rather than an understanding and intentional waiver of a Constitutional right."

And at page 17, the court said:

> "An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for intrusion. Any other rule would undermine the right of the people to be secure in their persons, houses, papers, and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state, where they are the law."

These principles have been vigorously enforced in the Circuit Courts of Appeal.

The leading case is *Judd v. U. S.* (C. A., D. C.), 190 F. 2d 649, where the defendant was under arrest and was asked whether he minded (the police) going to his room and taking a look at it, and he said, "No." The court at 650 said:

> "Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual: he may give his consent to the search and seizure. But such a waiver of consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied."

And at 652, the court further states:

> "Before a court holds that the defendant has waived his protection under the Fourth Amendment, 'there must be convincing evidence to that effect.'
> * * *
>
> "The relative credibility of the witness is not the central issue in this case. The real issue is whether the evidence offered by the government, taken at full value, meets the required standard. We hold that it does not; that there has not been a sufficient showing of true consent, free from duress and coercion. Standards of this sort must be maintained and enforced by trial and appellate courts. If they are not, the guarantees of the Bill of Rights can quickly disappear."

See also:

Contee v. U. S. (C. A., D. C.), 215 F. 2d 324, 327.

The decision in the *Judd* case was followed by the same court in *Nelson v. U. S.* (C. A., D. C.), 208 F. 2d 505, at p. 509, wherein it was stated:

> "It is clear from *Judd* and the many cases discussed therein that consent, like 'The fairness of a trial must be determined by appraisal of the whole rather than by picking and choosing among its component parts.' Only in that way can we ascertain whether consent is voluntary, *i. e.,* given 'freely and intelligently', without physical or moral compulsion."

In the case of *Higgins v. U. S.* (C. A., D. C.), 209 F. 2d 819, the police officer testified that the appellant had given his consent, which was denied by the appellant. The court stated at page 820:

> "We assume for present purposes that the officer's testimony was true and the appellant's false. Even

so, we think the record does not support the findings that appellant consented to the search * * *.

"Words or acts that would show consent in some circumstances do not show it in others. 'Non-resistance to the orders or suggestions of the police is not infrequent * * *'. True consent, free of fear or pressure, is not so readily found."

See also:

United States v. Di Re, 332 U. S. 581, 68 S. Ct. 222;

Wrightson v. U. S. (C. A., D. C.), 222 F. 2d 556;

United States v. Arrington (7th Cir.), 215 F. 2d 630;

United States v. Lantrip, 74 Fed. Supp. 946;

Heater v. U. S. (9th Cir.), 27 F. 2d 521.

The essential facts in the instant case are undisputed, and it has been held that the trier has no right to refuse to accept them.

See:

United States v. Johnson (5th Cir.), 208 F. 2d 729;

N. L. R. B. v. Ray Smith Transport Co. (5th Cir.), 193 F. 2d 142;

San Francisco Association for the Blind v. Industrial Aid, Inc. (8th Cir.), 152 F. 2d 532, 536 (D. C. Cal.), 1946;

Herbert v. Riddell, 103 Fed. Supp. 369, 389.

The records of the appellant, being his individual business records, were subject to Constitutional protection; and if they were to be obtained, it must be without any

deception whatsoever. The important factor is that our Bill of Rights contemplates that a citizen not only shall be protected by the immunity privilege, but also that he shall have an opportunity, after notice, to waive or stand on his privileges.

The rule to be followed by a court in determining whether or not there has been a waiver is set forth in the case of *Johnson v. Zerbst,* 304 U. S. 458, 464, 54 S. Ct. 1019, where the court said:

> "It has been pointed out that the Courts indulge in every reasonable presumption against waiver of fundamental Constitutional rights, and that we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily *an intentional relinquishment or abandonment* of a known right or privilege." (Emphasis supplied.)

The rationale of this rule is applicable for the reason that it involves a right under the Bill of Rights. Any other interpretation would narrow the safeguard under the Fifth Amendment.

In arriving at the conclusion that the government did not obtain the books and records of the appellant by illegal means, the court below wholly failed to follow the doctrines of waiver which have been established by judicial precedent.

POINT III.

The Appellant Was Entitled to a Hearing on the Basis of the Conflicting Allegations in the Complaint and Affidavits and Was Deprived of the Right to a Hearing of Evidence.

Appellant maintains that he made the requisite preliminary showing because, according to familiar principles, all that a movant in such proceedings is required to show is that illegal means were used to obtain evidence from him.

Rule 41(c) of the Federal Rules of Criminal Procedure, provides as follows:

> "A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without a warrant. * * * The judge shall receive evidence on the issues of fact necessary to the decision of the motion."

The court below erred in accepting the statements in the government's affidavits as evidence. These statements cannot be considered reasonably accurate or as having the legal significance amounting to the dignity of proof.

In the case of *United States v. Warrington,* 17 F. R. D. 25, Northern District of California, the court said at page 29:

> "An affidavit is not evidence" (citing *Vendetti v. U. S.* [9th Cir.], 45 F. 2d 543) "and it may not be used as evidence in this proceeding to satisfy the mandate that the Court 'receive evidence on any issue of fact.' The defendant is therefore obliged to support his motion by competent legal evidence produced or adduced in court at the time of the hearing.

If the rule were otherwise, the clear meaning of the mandate in Rule 41 would be nullified."

In the case of *United States v. Manno* (D. C., Ill.), 118 Fed. Supp. 511 (1954), the facts are analogous to the instant case. The court said at page 516:

"It is evident that there is a factual controversy as to the circumstances surrounding the examination of the books and their relinquishment to the government. In the opinion of the Court, this controversy needs to be resolved by evidentiary proof. The principles of law relative to the legality of investigations of books and evidence procured therefrom seem well settled. Evidence obtained by stealth is subject to a motion to suppress" (citing *Gouled v. U. S.*, 255 U. S. 305).

In view of the fact that appellant filed a civil proceeding, prior to indictment, for the return of personal property, Rule 56 of the Federal Rules of Civil Procedure (App. B) should control, and not Rule 41(e) of the Federal Rules of Criminal Procedure.

Under Rule 56 of the Federal Rules of Civil Procedure, it has been held that a court can only determine the existence of a genuine and material factual issue, and if none exists, then summary judgment cannot be granted.

This court, in the very recent case of *Griffeth v. Utah Power & Light Co.* (9th Cir.), 226 F. 2d 661, said at page 669:

"Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubts upon the point must be resolved against the moving party. This Rule, on account of these limitations, was not intended to be used as a substitute for a regular trial of cases where there are disputed issues of fact upon which the out-

come of litigation depends. This procedure is not, and of right ought not to be, a substitute for a trial by jury or judge."

See also:

Union Transfer Co. v. Riss & Co. (9th Cir.), 218 F. 2d 553, 554;

Dulansky v. Iowa-Illinois Gas & Electric Co., (8th Cir.), 191 F. 2d 881, 883;

Westinghouse Electric Corp. v. Bulldog Electric Products Co. (4th Cir., 1950), 179 F. 2d 139, 146;

Winter v. Southern Bell Tel. & Tel. Co. (5th Cir.), 181 F. 2d 341.

The court below, in denying this appellant a hearing on disputed facts, deprived him of an important right to a trial on its merits, and the cross-examination of adverse witnesses about crucial facts, particularly within their knowledge.

See:

Cf. Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 627, 64 S. Ct. 724;

Lane Bryant v. Maternity Lane Ltd. (9th Cir.), 173 F. 2d 559, 565.

The court below further deprived the appellant of the right to prove by oral evidence that he did not have an understanding and knowledgeable choice in waiving his Constitutional rights. Such an important issue should not be heard on affidavits.

See:

Kennedy v. Silas Mason Co., 334 U. S. 249, 256-257, 68 S. Ct. 1031;

Universal Oil v. Root Refinery Co., 328 U. S. 575, 580, 66 S. Ct. 1176.

Conclusion.

In view of the manifest errors, the judgment of the District Court should be reversed, and the case should be remanded to the District Court with directions to enter a judgment suppressing the information obtained from the appellant's books and records as evidence, or, in the alternative, directing the court below to set the matter down for a hearing.

Respectfully submitted,

Bernard B. Laven,

Attorney for Appellant.

APPENDIX A.

Section 3602, Internal Revenue Code, 1939.

Section 3602. *Search Warrants.*

The several judges of the district courts of the United States, and the United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises.

APPENDIX B.

Rule 56, Federal Rules of Civil Procedure.

Rule 56. *Summary Judgment.*

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to

permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.